No. 12,574

IN THE

United States Court of Appeals

For the Ninth Circuit

THE INDEMNITY MARINE ASSURANCE COMPANY, LIMITED,
Appellant,

vs.

FULGENCIA D. CADIENTE,
Appellee.

Appeal from the United States District Court for the District of Hawaii.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

INTRODUCTORY STATEMENT.

This is a suit in admiralty by appellee to recover on a policy of marine insurance for an alleged constructive total loss of the insured vessel Miss Philippine, by reason of the stranding of the vessel at Kaupo, Island of Maui, Territory of Hawaii, on June 6, 1949.

Upon trial duly had before the court below, the district court found for appellee in the face amount of the policy.

Appellee concurs in the jurisdictional statement of appellant.[1]

STATEMENT OF THE CASE.

As the findings of fact made by the district judge present what appellee claims to be the facts proved in the instant case, they are adopted and incorporated herein by reference as appellee's statement of the case, or statement of facts.[2]

The district judge, to put the case concisely, found:

1. That appellee was the owner of the vessel Miss Philippine insured by appellant for total or constructive total loss in the face amount of $10,500.00.

2. That on Monday, June 6, 1949, the vessel was stranded by reason of the displacement and loss of her propeller and rudder and driven onto a boulder-strewn beach at Kaupo, Island of Maui, Territory of Hawaii, and was being pounded and heavily rocked by a fairly high sea.

3. That appellee, and apparently also appellant, was notified thereof by the U.S. Coast Guard the same day.

4. That a Coast Guard craft went to the scene and reported that it was unable to draw the vessel off the rocky beach.

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[1]Appellant's Brief, pp. 1, 2.
[2]See Appendix B, below.

5. That appellee's husband and agent visited the scene the next day to examine the vessel but was unable to board her.

6. That appellee's agent took with him one Charles P. Hagood, master of King Limited's tug-boat, "Maizie C" who viewed the scene from the air, told Cadiente he could get the vessel into sea and tow her to Honolulu; and that a tentative oral agreement was made that he proceed.

7. That the following day Cadiente, the vessel's master and crew went aboard the Miss Philippine, made a more thorough examination, and that Cadiente came to the conclusion that it would be a hopeless and unjustifiable risk to undertake the salvage of the vessel, and that Cadiente decided then and there to abandon the vessel as a total loss.

8. That on the same day he phoned Mr. Hagood not to proceed with salvage operations and that he was abandoning the vessel.

9. That he returned to Honolulu, and on June 9 after getting advice from the party who built the vessel, he was confirmed in his judgment and decision of abandoning the vessel.

10. That in the evening of June 9 he received a letter from appellant demanding that he proceed to salvage the vessel.

11. That the following morning, he called at the office of the appellant, and advised appellant of his abandonment of the vessel.

12. That at the request of appellant he then went to the office of appellant's attorneys, and again notified appellant and its attorney of his abandonment. That Mr. Waddoups told him to get a lawyer and come back.

13. That he returned on Monday, June 13, and the following day appellee's attorney made written demand for loss under the policy.

14. That a charter party had been entered into between appellant and King, Limited, on June 11, to undertake the floating and towing of the vessel to Honolulu, with the specific provision that salvage operations were to be abandoned upon the aggregation of charges at the sum of $1,500; and that if the vessel were damaged or lost during salvage operations the charterer (appellant) would be responsible therefor.

15. That salvage operations commenced on June 11; that the vessel capsized upon reaching deep water, turning completely upside down; that this resulted in a serious towing problem, and would make difficult the probability of successfully crossing two rough channels on the way to Honolulu.

16. That when the $1,500 limitation was used up appellant was notified but gave no further instructions.

17. That Captain Hagood was apprehensive of towing to Honolulu and took the vessel to Kauna-

kakai, Molokai, though he could have taken her to other ports nearby on Maui.

18. That the vessel was tied up on June 14, at Kaunakakai, Molokai.

19. That agents of appellant flew from Honolulu to Molokai to have the boat lifted and righted.

20. That the vessel was given to one Yamamoto who took the vessel from the wharf to his yard.

QUESTIONS INVOLVED IN THE APPEAL.

1. Was appellee justified in abandoning the vessel on the beach at Kaupo, Maui?

   a. Was the vessel a constructive total loss?

   b. Did appellee have the duty to attempt rescue and salvage?

2. Did the acts of appellant insurance company

   a. Constitute acceptance of abandonment, or

   b. Waive abandonment or any defects in that abandonment?

SUMMARY OF ARGUMENT.

Appellee contends that regardless of the provision of the policy as to what constitutes a constructive total loss, it was not *under the facts of this particular case,* incumbent upon the assured to float, tow and repair the vessel to ascertain whether such expense would total $21,000:

1. Salvage attempts by the assured were hopeless, and all subsequent events confirmed appellee's decision to abandon and refuse to salvage;

2. The insurer (appellant) *by its conduct* made itself liable as for a constructive total loss, and waived all defects, if any, in the abandonment.

ARGUMENT.

I. APPELLANT'S CONTENTION THAT THE INSURED VESSEL WAS NOT A CONSTRUCTIVE TOTAL LOSS WHEN APPELLEE TENDERED HER ABANDONMENT.

A. APPELLANT'S CONTENTION THAT CONSTRUCTIVE TOTAL LOSS ARISES ONLY WHEN EXPENSE OF RECOVERING AND REPAIRING THE VESSEL EXCEEDS $21,000.

Appellee will be the first to admit that no attempt was made during the trial to prove the cost of recovering and repairing the insured vessel.

It is respectfully urged, however, that in view of the conduct of the insurance company, such is not a prerequisite to recovery hereunder.

And of the same opinion, was the district judge.[3]

If no other factors were present then the contention of appellant would have merit. Its fallacy lies in assuming that this is the only theory open to the appellee.

For cases of this type are decided, not on generalities of the law, but on the *facts of the case.*

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[3]District Judge's opinion and conclusions, Ap. 21-23, Appendix B, below.

The vessel was stranded on the island of Maui; and repair meant first getting the vessel back to Honolulu, where there are facilities. Even appellant's charter party recognized this.[4]

Moreover, the evidence in the case conclusively confirmed appellee's judgment that it was not possible to get the vessel off *and* tow her to Honolulu.

> "A. From Kaupo to Lahaina, Maui, you are traveling mostly in the lee of the prevailing winds, and it is very smooth, under normal tradewind conditions. As soon as you come out from behind the northwest point of Maui, you encounter tradewinds sweeping down the channel between Maui and Molokai. It is still a trifle rough but not as rough as the channel between Molokai and Oahu. As you can see (referring to map), the channel between Molokai and Oahu (19) is much wider than the one between Molokai and Maui, and it is a much longer trip and there is little or no protection from the wind and the waves that prevail in normal tradewind weather.
>
> Q. So isn't it a fact, Mr. Hagood, that the reason you didn't continue to tow the vessel to Honolulu is because of that channel and the condition of the 'Miss Philippine'?
>
> A. That's right. In her capsized condition she made a very heavy drag, and I was only able to move it very slowly.
>
> Q. How fast were you going, by the way, average?
>
> A. Approximately one and eight-tenths knots per hour. That is very slow. And it would have taken me nearly two days to—well, I will revise

[4]Ap. 80-83; also set forth below, Appendix A.

> that—make it 30 hours. It would have taken me about 30 hours to tow the wreck at the speed that I was making from Kaunakakai on into Honolulu. And I was afraid at that time that the weather would increase in intensity and I stood a chance of losing the wreck in the channel between Molokai and Oahu." Ap. 61-62.

Appellant has written an excellent brief which gives an academically fine review of generalities of maritime and insurance law.

We have only one quarrel with appellant's position—it fails to fit the cases to the facts of *this* case.

For it was the insurer (appellant) who was responsible for the final outcome of the vessel, nay, who actually abandoned the vessel on the high seas.

After learning of the stranding of the insured vessel appellant arranged for a charter party to pull the vessel off the beach and tow her to Honolulu, with a money limit of $1,500. When the money limit had been reached the insured vessel was in tow at sea, but was abandoned by the insurance company.[5]

> "The Court. Well I heard what you said, but I am not quite sure what you mean by what you said. Now, you engaged the King company to take the vessel off the beach there, and you put a time limit or a money limit?
>
> The Witness. Yes, by the terms of the charter party they were to be paid at the rate of $15.00 an hour.

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[5]See testimony of Mr. Chipchase, treasurer of Agent for Insurance Company, Ap. 156-159.

The Court. And that time expired when they had the vessel in tow out at sea?

The Witness. That's correct, sir.

The Court. Now, they didn't abandon the vessel at that time, but went ahead and go with responsibility and apparently on their own time took her into safe port and tied her up. Now, you say that when your contract with them ran out by its terms, that you abandoned the boat?

The Witness. They asked for instructions, your Honor, and we said there are none.

The Court. So it was up to them to do whatever they (118) wanted? They could cut her loose and be responsible only to the laws and regulations under which the Coast Guard operates?

The Witness. Right, yes, sir." Ap. 158-159.

And when the insurance company (appellant) took the vessel off the beach, towed her and then abandoned her at sea, it "bought" the vessel, and must be held liable as for a constructive total loss.

> "It would seem that an underwriter must not take possession of the property unless he intends to accept the abandonment; and meddling with it may be construed as acceptance, and bind him."
>
> Eldridge on Marine Policies, 2d Edition, p. 189.

Appellee did not feel it necessary to present evidence as the cost of repairs because the evidence established that it was impossible to tow the vessel to Honolulu where as a practical matter it could be repaired; but more important—that by reason of the acts of the appellant, in removing the vessel, towing

same and abandoning same at sea, appellant exercised acts of ownership and accepted or waived abandonment.

The court felt the same way.

For these reasons it is not felt necessary to dwell at length upon appellant's argument appertaining to the provision in the policy as to cost of recovery and repair. Appellant by its action took itself out of the protection of such provision.

B. APPELLANT'S CONTENTION THAT NUMEROUS FINDINGS OF FACTS WERE CLEARLY ERRONEOUS.

First it should be kept in mind that *all* the evidence adduced in the trial below was in open court, and that the findings and conclusions of a district court are entitled to great weight here.

The record speaks for itself—and it is submitted that all the material findings of fact are supported by adequate testimony and evidence.

> 1. That on June 8, 1949, parts of the vessel's keel were carried away.

Appellant has misquoted the findings of the district court; the court found:

> "her keel was badly battered and damaged with parts carried away."[6]

Mr. Hagood testified that the keel was chafed on the bottom (Ap. 66); and Mr. Gallagher, that the keel

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[6]Ap. 16.

was torn. (Ap. 127.) And "it was scuffing due to being lodged in between rocks." (Ap. 127.)

Mr. Cadiente testified that the keel was "almost gone." (Ap. 92.) We submit that there is sufficient in the record to warrant the finding.

> 2. That libelant-appellee decided on June 8, 1949 to abandon the vessel.

Appellant objects that this finding is irrelevant and not supported by other evidence; to which we answer that there was sufficient evidence warranting the court in making this finding.

Such an objection merely shows to what length appellant is willing to proceed to extend its brief. The court did not find that there was a technical abandonment on that day.

Moreover, the finding as quoted by appellant is removed from its context.[7]

> 3. That Mr. Cadiente asked the Coast Guard on June 8, 1949, to notify respondent-appellant of abandonment.
>
> 4. That Mr. Cadiente told Captain Hagood on June 9, 1949, that he had abandoned the vessel.
>
> 5. That after discussion with the vessel's builder on June 9, 1949, he was confirmed in the judgment and decision to abandon her.

As to these findings it is submitted that there is evidence in the record to support the same.

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[7]Ap. 16.

But even if not, it would not militate against appellee's main contention herein that appellant's liability is based upon appellant's conduct in assuming control, ownership and finally abandoning the vessel at high sea.

> 6. That libelant-appellee on June 10, 1949, told respondent-appellant and its attorney that she had abandoned the vessel.

Appellant confuses a stipulation by this proctor that a certain conference was held on June 13 to preclude appellee from having been present at an earlier conference with representatives of appellant.

Again we have a compounding by appellant of a finding by the court in an attempt to challenge the same. The important finding to keep in mind that was made by the court and does find corroboration in the evidence is that on June 10, Cadiente *did* tell Mr. Matthew at *his* office that he had abandoned the vessel (Ap. 171-172). The abandonment at the insurance office would be sufficient—whether or not it was later given again at the attorney's would not be of moment.

The important fact to keep in mind is that no matter how far forward appellant would move this notice of abandonment, the vessel was still under control of appellant annd clearly abandoned by appellant at sea after notice of appellee's abandonment.

> 7. That respondent-appellant's attorney on June 10, 1949, told Mr. Cadiente to come back and bring his wife on June 13, 1949.

There is evidence to support this. (Ap. 175.)

> 8. That before leaving Kaunakakai on June 14, 1949, Captain Hagood told Yamamoto that he could have the vessel if he moved it away from the wharf.

Again we have a misquoting of the court's finding. The court found:

> "* * * and, while the full scope of the conversation was not disclosed, the part disclosed strongly indicated that he told Yamamoto he could have the boat if he moved it away from the wharf to his lot. *In any event the vessel was taken to Yamamoto's inland yard at some later date.*"[8] (Italics added.)

It is submitted that there is substantial evidence in the record to warrant the court's finding hereon, keeping in mind that the language of the district court was not couched in such specificity as appellant would have this court believe.[9]

> 9. That Captain Hagood testified that he would not have accepted the wreck as a gift.

With respect to this finding it should be pointed out that the same is substantiated in the testimony (Ap. 58).

Moreover, counsel for appellant failed to make any objection to this testimony.

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[8]Ap. 20-21.
[9]Ap. 56-57.

"Q. So that the vessel, when you last saw it, was or was not in a seaworthy condition?

A. It was definitely not in a seaworthy condition. In fact, it had no further value to me as far as I could see. I wouldn't have taken it as a gift at that point." (Ap. 58.)

10. That the vessel's sponsons were crushed by respondent-appellant in righting the vessel at Kaunakakai wharf.

11. That neither party replied to a letter of King, Limited, dated July 16, 1949, stating the company's intention to cannibalize and destroy the vessel.

Appellant complains that the trial court may have drawn unfair inferences from the above.

In view of the court's opinion as to the conduct of the appellant on June 11-13,[10] these issues would have no bearing on the result of the case, and even if such findings were erroneous, they do not constitute prejudicial error, which would warrant a reversal herein.

12. That respondent-appellant questioned the right of libelant-appellee to refuse to take over the vessel at Kaunakakai.

This was not a finding of fact by the court, as appellant's brief would indicate, but is the preface in the district court's "opinion and conclusions"[11] and

[10]Ap. 22.
[11]Ap. 21.

needs no further consideration at this stage of argument.

> 13. That respondent-appellant undertook to salvage the vessel after receiving notice of abandonment.

It is submitted that there is substantial evidence in record to warrant such a conclusion by the court.

But even if there were no abandonment at all by appellant, appellee, by its conduct in removing the vessel from the beach, authorizing $1,500 worth of rescue and salvage and towing, and then to abandon the vessel at sea, when the money limit had been used up, cured the defect.

> 14. That respondent-appellant abandoned the vessel at sea.

Appellee cannot emphasize too strongly the correctness of the court's conclusion with respect to this point.

For by the time appellant gave "no further instructions" to the salvage tug, it certainly had notice of appellee's abandonment.

Appellant would shrug this off by its statement "thus rejecting her abandonment"; (Appellant's Brief, 38) but the record is abundantly and eloquently clear to the effect that it was appellant who took the vessel off the beach at its own responsibility; and it was appellant who left the insured vessel at the mercy of the high seas, and turned over its control

unto the salvage tug. The very terms of the charter party[12] and callous "no instructions" from the insurer indelibly stamp this conduct as going beyond rescue attempts; assuming control over the vessel, and in law effecting a waiver of any abandonment, and constituting an acceptance of appellee's abandonment.

Appellant's conclusion that the vessel was well on her way to a safe port (Appellant's Brief, 39) is naive to say the least.

Yes, the vessel was towed off the reef—but it immediately turned turtle upon reaching deep water—and this rendered the salvage attempts *a failure*—for it was now impossible to tow the vessel to Honolulu.[13]

She was taken to a "safe" port, not on any instructions from appellant—but from instructions from the home office of the tug Maizie-C, attempting to tow the vessel to Honolulu.[14]

Our Supreme Court has said:

> "The defendants complain, however, that they have been held liable as for a constructive loss,

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[12]See Charter Party, Ap. 80, 82:

> "e. It is expressly agreed between the parties that if said salvage operations have not been successful at the time charges for the use of the Maizie-C, including charges for the return to Honolulu, amount to $1500, *said operations are to be abandoned* and the Maizie-C is to return forthwith to Honolulu, unless Charterer through its agent on the spot, authorizes a continuation of said operations in writing." (Italics added.)

[13]Ap. 52, 53, 56, 61, 62, 68, 69.

[14]Ap. 68, 69.

when there was no right to abandon, and when the abandonment of which the plaintiff gave notice was not accepted. * * * It is an established fact that there was no right to abandon when they did take possession of the vessel. And it was expressly stipulated in the policy that acts of the assured, or insurers, or of their joint or respective agents, in preserving, securing or saving the property insured, in case of danger or disaster should not be considered, or held to be a waiver or acceptance of abandonment. It is well settled, however, that an offered abandonment may be accepted, even when the assured has no right to abandon, and if accepted, it must be with its consequences. And an acceptance need not be expressly made. *It may even be refused, and yet the insurers, by their conduct, make themselves liable as for a total loss.*" (Italics added.)

Phoenix Insurance Co. v. Copelin (1869), 76 U.S. 461, 10 L.Ed. 739, 741.

C. APPELLANT'S CONTENTION THAT EXPENSE OF RECOVERING AND REPAIRING THE VESSEL WOULD NOT EXCEED $21,000.

It is admitted that appellee presented no evidence as to expense of recovering and repairing the vessel.

We rest on the proposition:

1. That the assured need not recover and repair to ascertain the cost thereof, before he can abandon; particularly when

2. The insurer *by its conduct* makes itself liable and by its conduct waives any defect in that abandonment, even if the abandonment be improper when tendered.

We shall deal with this, appellee's main point, below, and mention it at this point in our brief only to match the chronology and subject matter as treated by appellant.[15]

Appellant's reference to the condition of the Miss Philippine on June 13, 1949 (Appellant's brief, 48), is, however, noteworthy of mention, for by this time appellee itself has abandoned the carcass of the vessel to the high seas or mercy of a third party.

II. APPELLANT'S CONTENTION THAT FAILURE OF APPELLEE TO ACT FOR THE DEFENSE, SAFEGUARD AND RECOVERY OF THE INSURED VESSEL BARS HER RECOVERY.

Appellant urges that under the "sue and labor clause" of the insurance policy appellee had the duty to attempt to rescue the vessel and because of its failure so to do is barred from recovery hereunder, and has assigned two grounds of error therefor.[16]

This clearly misconceives the function, purpose and effect of the sue and labor clause.

It does not mean that simply because a ship owner fails to make rescue attempts he is *ipso facto* barred from recovery on his policy.

Even in the case of *Searles v. Western Assur. Co.*[17] cited by appellant, the court said:

> "We do not say that appellant was compelled to make an effort to save the vessel before he

[15]See, *infra*, LAW APPLICABLE TO THIS CASE.
[16]Appellant's Brief, page 49. Assignments of error 22 and 23.
[17]40 So. 866, 869.

could abandon and sue, but we do say that the conditions warranting him in abandoning it must have existed, and must have been proven by him to exist."

The district court concluded that appellee's judgment in abandoning her on the beach was justified under the circumstances and was "vindicated by every subsequent event."[18]

For in the instant case, appellee first contemplated rescue operations, and then after a more thorough investigation of the wreck decided against it.[19]

Yes, it might well be that appellee's failure to attempt rescue or salvage might have a bearing under other circumstances; but

1. The ship owner's decision was based upon his judgment that rescue operations were hopeless;

2. Subsequent events, as to the capsizing of the vessel and the impossibility of returning her to Honolulu confirmed that judgment; and

3. The conduct of appellant cured and waived the defect, if any, in any event;

4. Where there is acceptance of abandonment, the ship owner need not justify the abandonment.

If the circumstances of the stranding justified an abandonment, the assured need not "sue and labor" or attempt to rescue.

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[18]Ap. 21-23.
[19]Ap. 64.

And if there be acceptance of abandonment, he need not justify the abandonment. Or if the conduct of the insurer were such as to amount to acceptance or waiver of abandonment, the insurer becomes liable as for a constructive total loss.

III. APPELLANT'S CONTENTION THAT THE ACTS OF APPELLANT IN RECOVERING, SAVING AND PRESERVING THE INSURED VESSEL DID NOT CONSTITUTE ACCEPTANCE OF HER ABANDONMENT.

Appellant is in effect urging its action went merely to rescue and save the vessel and then turn her over or back to the assured.

There is not the slightest bit of evidence in the record however to substantiate this theory.

Appellant did succeed in floating the wreck—but it went beyond just salvage attempts.

It authorized a towing job with a $1,500 limit and then when the limit was reached abandoned the wreck on the high seas.

The skipper of the rescue tug could have cut the tow line, at this stage, and would have, except he was afraid it might become a navigational hazard. Where the vessel was tied up was decided not by appellant but by the skipper of the salvage tug. In other words, by this time appellant had washed its hands of the Miss Philippine. Upon being notified that the vessel was tied up at Kaunakakai, appellant dashed back into the picture, had the vessel righted and tied up;

and then profoundly advised appellee that it was still her boat.

This is the theory appellant advanced without success before the trial court, and, it is respectfully urged, warrants no consideration before this court.

Once the abandonment is accepted, the rights of the parties are fixed—and once appellant's conduct amounts to acceptance or waiver of abandonment then again the rights of the parties are fixed.

This case is that simple.

> "Acceptance of an abandonment by the insurer fixes the rights of the parties, and all questions in regard to its seasonableness or sufficiency must be considered waived. An acceptance of an abandonment whether express or implied, precludes the contention that the vessel was not damaged by a peril insured against, or that it was not a total loss. An offered abandonment may be accepted, even if the insured originally had no right to abandon."
>
> Appleman, *Insurance Law and Practice,* Vol. 6, p. 79, citing cases.

> "An abandonment once made and accepted fixes the rights of the parties, and renders the insurers liable as for a total loss. * * * The title of the vessel passes to the insurers under such circumstance." And once there is acceptance of the abandonment by the acts of the insurer, "it is too late for it to recede."
>
> *Richelieu & O. Nav. Co. v. Ins. Co.* (Mich. 1888), 40 N.W. 758, 764.

> "If the abandonment was accepted, which seems to be the only serious question, all question in regard to its seasonableness or sufficiency must be considered as waived."
>
> *Reynolds v. Ocean Ins. Co.,* 39 Mass. 191, 199.

The provision in the policy, so strongly relied upon by appellant that:

> "nor shall the acts of the Assured or Insurers, in recovering, saving and preserving the property insured, in case of disaster, be considered a waiver or an acceptance of an abandonment,"[20]

does not give the insurer the right to take possession of the vessel and decide for the owner what shall be done with her,

> "but on the contrary, when the insurer takes possession he is under the duty of disposing of the vessel in the manner provided by the policy, and in default thereof, is held to have accepted the abandonment."[21]

Here the insurer took it upon itself to float the vessel, put her under a charter party with a money limit, and after the running out of the money limit abandoned her at sea.

Nowhere, under law, or under the authority of the insurance policy, can appellee find justification for its conduct in that respect—and strangely enough,

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[20]Appellant's Brief, p. 55.

[21]*Alliance Ins. Co. v. Producers' C. Oil Co.* (Miss. 1915), 67 So. 58, 60.

nowhere in appellant's brief do we find appellant meeting that very issue.

Unless, of course, appellant wishes to urge that its "no instructions" while the vessel was being towed, and which conduct was declared by the trial judge to amount to abandonment was an act in "recovering, saving or preserving" the vessel.

Appellant cites many cases in support of its contention.

It relies, for example, on *Washburn & Moen Mfg. Co. v. Reliance Ins. Co.*[22] where the court went on to say

> "and what was done * * * was no more than it had the right to do." (Ap. p. 19.)

Hardly comparable to the case at bar where the insurer clearly went beyond any act of just recovery, saving or preserving.

In the case of *American Merchant Marine Ins. Co. of N. Y. v. Liberty Sand & Gravel Co.*[23] it was held that although the marine policy declared that insured should not have the right to abandon the vessel, thus abrogating right to do so and make claim for total loss on proof that cost of restoring vessel would exceed half her value, and though on tender by insured of abandonment insurer refused acceptance, yet where insurer thereafter raised the craft and put her on

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[22]179 U.S. 1.

[23]282 F. 514 (CCA N.J. 1922) cert. den. 43 S. Ct. 96, 260 U.S. 737, 67 L. Ed. 489.

dry dock, and then later floated her to place from which she had been raised, removed plugs and sunk her, such action was held to amount to constructive acceptance of abandonment.

Appellant complains that the pleadings raised no issue of acceptance of abandonment.[24]

It should be noted, however, that the parties were in court, and all issues herein were litigated before said district court. Moreover, appellant failed to raise such point during the proceedings below; failed to incorporate such matter in its statement of points on which appellant intends to rely on appeal;[25] nor in its 32 assignments of error.[26]

Nor did the judgment go beyond such issues nor beyond the scope of the relief demanded.

Appellant cites the *Soelbery v. Western Assur. Co.*[27] case, decided by this court, for the proposition that the acts of the insurer were protected by the sue and labor clause—but even there this court was quick to note that there were no acts performed beyond the powers conferred by the clause.

That is hardly the case here where the insurer clearly took over on its own and abandoned at sea.

And too, in the case of *Chicago S. S. Lines v. U. S. Lloyds,*[28] cited by appellant, the court said:

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[24]Appellant's Brief, p. 55.
[25]Ap. 205.
[26]Ap. 31.
[27]119 F. 23.
[28]2 F. (2d) 767.

> "Neither party, however, is permitted to take refuge under this clause (that acts of insurer or insured shall not be considered as waiver or acceptance of abandonment, etc.) from the consequences of inconsistent conduct." (Parenthetical matter added.)

The court therein noted that the insurers at no time took possession and control of the ship. That is not the situation that obtains here.

The *Jeffcott*[29] case cited by appellant also refers to cases where insurers have been held under a theory of constructive acceptance of abandonment where they "are based on facts showing some exercise of dominion over the vessel inconsistent with the position of an insurer."

Clearly the case here.

In any event, appellant would sweep all this away by urging that the acts of appellant were completed before any tendered abandonment—which we urge is not supported by the record—and that in any event, the acts of the insurer were so inconsistent with those of an insurer as to constitute a waiver or acceptance of any abandonment.

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[29]*Jeffcott v. Aetna Ins. Co.*, 32 F. Supp. 409, Appellant's Brief, p. 60.

THE LAW APPLICABLE TO THE CASE.

Appellee contends that the following propositions of law, namely:

1. That an insurer may *by its conduct* accept or waive abandonment; and
2. That if it does,
   a. whether or not the vessel was a constructive total loss under certain fixed money limitations,
   b. or whether or not the assured attempted to rescue or salvage,

   is immaterial,

are well established propositions of law, applicable to the case at bar, and that the decision of the district judge was in consonance with the applicable authorities and the facts of this case.

Appellant *admits* the charter party agreement, its agreement to pay not more than $1,500 in salvage charges, and that it refused to give the salvor further instructions when the amount was used up while the vessel was under tow on the high seas.[28]

The district court properly concluded that such conduct on the part of the insurer amounted to an abandonment at sea of the insured vessel by the insurer.[29]

If this court agrees, then no other matter need be considered. For such conduct is clearly an act in-

[28]Appellant's Brief, p. 54.
[29]Ap. 22.

consistent with the dominion, control and possession of the assured, and goes beyond any authority vested in the insurer by the policy.

It fixes the rights of the parties; and that the insurer came in later, after the vessel was tied fast by the salvage tug, does not dispose of the insurer's abandonment of the day before, and amounts to a constructive acceptance of appellee's abandonment—nay it amounts to a waiver of any abandonment, even if this court should decide that appellee's abandonment came too late, and we contend it did not.

For, the charter party agreement, the floating of the wreck off the beach, the towing at sea, the refusal to give further instructions, the continuation of the tow to Kaunakakai, the tying up there, were all done without the consent or authority of appellee, and were acts not consistent with that of an insurer.

When appellant notified the rescue tug that it had no further instructions, it abandoned the wreck to the high seas, it waived abandonment or any defect therein, by appellee, for it had exercised all the elements of control, possession, dominion and ownership over the insured vessel.

By its conduct it clearly made itself liable as for a constructive total loss.

It cannot seek the protection of the sue and labor clause nor of the $21,000 cost of repairs definition of constructive total loss.

Its conduct has taken it far from beneath the umbrella of protection of those clauses.

See:

Appleman, *Insurance Law and Practice,* Vol. 6, p. 79 and cases cited;
Eldridge, on Marine Policies, pp. 189, 190;
Cinc. Ins. Co. v. Bakewell, 43 Ky. 541.

One of the leading cases in support of appellee's contention is *The Phoenix Insurance Company v. Copelin.*[30]

We submit the case as authority for the position being urged herein by appellee.

There the court held the insurance company liable notwithstanding a provision in the policy that the acts of the insurers, in preserving, securing or saving the property insured should not be considered or held an acceptance of an abandonment. That provision was held to refer only to authorized acts.

Appellant urges that this case is not applicable to the case at bar.[31]

Appellee urges, however, that the case is in point and decisive herein.

Furthermore, Mr. Justice Story's opinion in the case of *Peele v. Merchants' Ins. Co.*[32] covers the situ-

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[30]76 U.S. 461, 10 L. Ed. 739, *supra.*
[31]Appellant's Brief, p. 57.
[32]19 Fed. Cases, No. 10,905, p. 98.

ation here notwithstanding appellant's pronouncement to the contrary.[33]

Taking possession and control of the vessel, floating and towing her to abandon her at a fixed price limit are not within the contemplation and protection of the clauses being urged herein by appellant.

> "The question then comes to this, whether the underwriter has a right, in case of stranding, without the consent of the owners, to take the exclusive possession and management of the ship, and afterwards to retain and repair the ship on account of the owners. If he has not, then the exercise of such a right can stand only upon the acceptance of the abandonment as a transfer of property. * * * Has the law ever contemplated that he can take possession of the ship and decide for the owner what shall be done with her?"
>
> *Peele* case, *supra,* p. 118.

Even if there had been no abandonment by appellee, appellant would be liable here, for it acted not as an insurer, but as owner.

Mr. Justice Story continues to put the case aptly, and it is as good law today, as then (1822):

> "If, when a ship is abandoned, the underwriters do not choose to accept it, they have a right to lay by and wait the event. They are to act in this, as in all other cases, according to their sound discretion. If the owners have abandoned without just cause, the underwriters are not prejudiced by leaving the ship as she is. * * *

[33]Appellant's Brief, pp. 55, 56.

> If after abandonment, the owners were to proceed to repair the ship without consultation with the underwriters, it would be a waiver of the abandonment, because it would be doing an act inconsistent with the asserted transfer of ownership. It would deprive the underwriters of the right of electing whether to repair the ship or not and thus compel them to spend their money in a way which they might deem useless. The same principles must govern, when like acts are done by the underwriters * * *."[33]
>
> (*ibid.* p. 119.)

Appellee contends that the conduct of the insurer went beyond the contemplation, authorization and protection of the provisions of the policy; that its acts were inconsistent with that of an insurer, and that by its conduct it waived abandonment.

In summary: appellee rests upon the contention that the acts of the insurer went beyond the protection, authority and contemplation of the insurance policy; were acts inconsistent with those of an insurer; that upon abandonment by the insurer of the insured vessel on the high seas, abandonment by the assured was waived or accepted; and that the rights of the parties were fixed as of that moment.

That appellant should not be heard that it tendered back the insured vessel, safe and sound, before any abandonment by the assured.

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[33]See also:
American Merchant Marine Ins. Co. v. Liberty S. & G. Co., 282 F. 514, *supra;*
Hume v. Frenz, 150 F. 502.

That appellant's claim:[34]

> "That its acts of saving the vessel were, in point of fact, completed before the appellee even tendered abandonment"

is without justification in the record.

CONCLUSION.

Whether the acts of the insurer amounted to an acceptance or waiver of abandonment is a mixed question of law and fact.

The opinion of the district judge, before whom all the evidence was presented in open court, and who is familiar with Hawaiian waters where the stranding occurred is entitled to great weight here.

The decision of the lower court should not be reversed unless it clearly appears that the decision was contrary to the evidence.

We contend that the evidence in this case leads to the overwhelming conclusion that the insurer, by its conduct accepted or waived abandonment, and that the decree appealed from should be affirmed.

Dated, Honolulu, Hawaii,
October 23, 1950.

Respectfully submitted,
HYMAN M. GREENSTEIN,
Proctor for Appellee.

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[34]Appellant's Brief, p. 61.

(Appendices A, B, and C Follow.)

Appendices.

Appendix A

Charter Party[1]

Whereas the sampan Miss Philippines is aground in the ocean at Kaupo, Maui, Territory of Hawaii, and

Whereas, Indemnity Marine Assurance Company, Limited, hereinafter known as Charterer, is the Insurer of said sampan, and desires that an attempt be made to float and tow same to a Marine Railway at Honolulu, Territory of Hawaii aforesaid, and

Whereas, King Limited, a Hawaiian Corporation of Honolulu, Hawaii hereinafter known as Owner, owns the oil screw Maizie-C, and is willing to let the use of same to Charterer upon the terms and conditions which appear below,

Therefore it is hereby Mutually agreed by and between Charterer and Owner, as follows:

1. Charterer agrees to hire and Owner agrees to let the oil screw Motor Boat Maizie-C, official number 236082, for the purposes and on the conditions hereinafter set forth.

2. The said vessel Maizie-C shall get underway from Honolulu on or about June 10th, 1949, and proceed to Kaupo, Maui, and there control of said vessel shall pass to Mr. Gallagher, American Bureau of Shipping Surveyor, as agent for the Charterer, and the proposed salvage operations shall be conducted by his authority and under his direction. In the event

[1]Ap. 80.

that these are successful the Master of the Maizie-C shall then tow Miss Philippines to a Marine Railway at Honolulu aforesaid.

3. Charterer agrees to pay as hire for the said Maizie-C, her crew and equipment, without discount, the following sums:

a. $15.00 per hour for the hire of the Maizie-C and her three regular crew members, computed from the time she is underway at said Honolulu, until she is again secured in said Honolulu at the end of her voyage.

b. $1.00 per hour for the hire of each of three additional crew members, their time to be computed as provided for the Maizie-C in sub-paragraph a. (above).

c. $100.00 for the additional insurance premium which is to be charged the owners of the Maizie-C as a result of the said use.

d. Any and all other expenses incurred by the Maizie-C, her owner or agents, as a result of the said use and which are reasonably necessary thereto.

e. It is expressly agreed between the parties that if said salvage operations have not been successful at the time charges for the use of the Maizie-C, including charges for the return to Honolulu, amount to $1,500.00, said operations are to be abandoned and the Maizie-C is to return forthwith to Honolulu, unless Charterer, through its Agent on the spot, authorizes a continuation of said operations in writing.

4. Salvage attempts are to continue so long as said Mr. Gallagher deems same feasible, subject, however, to the provisions of paragraph 3. e. above.

5. If Miss Philippine is damaged or lost during the salvage operations the Charterer shall be responsible therefor, and said Charterer hereby covenants to hold the Owner harmless on account of any claim as a result of such damage or loss.

6. Charterer, in consideration of the use of the Maizie-C, her tackle, engines, and crew, expressly agrees to pay for same as specified in paragraph 3 above, regardless of the success of operations and without set off in the event said Miss Philippine is damaged, destroyed or lost as a result of said operations or towage, even though such damage or destruction or loss is the result of the negligence of Owner, its agents or servants.

Wherefore, the parties hereto have set their hands this 11th day of June, A. D. 1949.

Indemnity Marine Assurance Company, Ltd. By its General Agent The Bonding and Insurance Agency, Ltd. (a Hawaiian Corporation)

By /s/ A. H. Matthew,
Its Charterer.

King, Limited,

By /s/ James T. McAndrews,
Its Secretary.

Owner.

Admitted January 16, 1950.

Appendix B

Findings as Gleaned and Construed from Evidence[2]

Libelant was the owner of an oil screw vessel named "Miss Philippine", an exaggerated type of sampan, built and registered at Honolulu, Hawaii, in 1947. The vessel was adapted for and used by the owner, with other vessels, in off-shore fishing. Agents or representatives of the respondent came to libelant's home and solicited the writing of insurance on said vessel, and on December 8, 1948, an insurance policy was written by respondent in favor of libelant-owner to cover for a year, a total or constructive total loss in the payable sum of $10,500. Prior to December, 1948, another insurance agent's company had carried a more comprehensive policy for a year at a higher rate, 8%, but had not notified libelant of its expiry or solicited its renewal. The payee of the present policy, in event of loss, was Bank of Hawaii, a party in interest as mortgagee at the time, and the policy was delivered by respondent directly to the bank. Neither the libelant or Telesforo Cadiente, her husband, agent and business manager, ever saw the policy or the addendum rider clipped thereto, which rider requires "that in ascertaining whether the vessel is a constructive total loss $21,000 shall be taken as the repaired value". It was in no manner explained to either of them in any of its terms and they were given no opportunity to read it, being told

[2]Ap. 13.

the policy covered total and constructive total loss in the sum of $10,500. The premium of $315 was paid.

On Monday, June 6, 1949, said vessel was stranded by reason of the displacement and loss of her propeller and rudder and, dragging her anchor, she was driven by the sea onto a boulder-strewn, isolated beach at Kaupo, Island of Maui, Hawaii, so that she lay athwart or transverse to the sea and was being pounded and heavily rocked by a fairly high sea. As soon as her master could obtain a means of communication he notified the U. S. Coast Guard on that island who in turn communicated information of the stranding to the husband and managing agent of the owner at Ewa, Oahu. Apparently, this information was communicated the same day to the respondent and to King, Limited, a tugboat operator at Honolulu. A Coast Guard craft went to the scene and from the sea looked the situation over and reported to the master that they could do nothing toward an attempt to draw the vessel off the rocky beach as the sea was running too high.

The owner's agent, Telesforo Cadiente, went to Maui the following day by plane and by automobile reached the beach where the vessel was stranded. He and the master of the stranded vessel made what inspection and examination they could from the shore and saw she was rocking heavily between large boulders and that part of her hull was stove and the sea was surging through her. They could not board her as the sea was running high and throwing water over her.

Before leaving Honolulu, Cadiente was approached by Charles P. Hagood, master of King, Limited's tugboat "Maizie C", who told him he would like to go to Maui and look at the stranded vessel, and asked libelant's agent to pay his passage for that purpose as he believed he could get the vessel off the rocks and bring her to Honolulu. Cadiente paid Hagood's transportation and, after arriving at Maui, Hagood chartered a small airplane and was flown to the site of the vessel and circled over and around it several times at low altitude. Upon landing he told Cadiente that he believed he could get the vessel into the sea and tow her to Honolulu. A tentative oral agreement was made that he proceed.

The following morning, Wednesday, June 8, Cadiente and the vessel's master and crew again visited the vessel. On this occasion they were able to get on board and make a more intimate examination, although she was still being heavily rolled between the boulders and was much more damaged than the day before. A number of her ribs were broken and some carried away on the port side, amidship and aft; her keel was badly battered and damaged with parts carried away; water was surging through the engine room; and she was firmly wedged between boulders, being broken more with each heavy sea that struck her.

Cadiente and the vessel's master came to the conclusion as a result of this inspection that it would be a hopeless and unjustifiable risk to undertake salvage and rebuilding of the vessel and Cadiente decided

then and there to abandon her as a total loss, and told the crew to return to Honolulu. He telephoned to Captain Hagood not to come to Maui with his tug, the "Maizie C", to undertake salvage operations and told the Coast Guard office as well that he was abandoning the vessel and to tell Hagood and the Insurance Company. He then returned to Honolulu and again told Hagood not to take the "Maizie C" to Maui, that he had abandoned the boat.

The morning of June 9, he went to get advice as to the feasibility of rebuilding the boat from J. Tanimura, the proprietor of Kewalo Shipyard, who had built the boat in 1947, and after discussing with Tanimura the position and condition of the vessel and getting the advice of the builder he was confirmed in his judgment and decision of abandoning her as an irredeemable total loss.

That evening at 8:00 p.m. he received a letter dated June 9, signed Mr. A. H. Matthew, office manager of the agents of respondent, advising him that the sampan "Miss Philippine" was stranded at or near Pauhana, Maui, and that he "proceed with salvaging of this vessel in accordance with the conditions of the above policy."

The morning of Friday, June 10, he called on Mr. Matthew at his office and told him that he had talked with the builders and the Coast Guard and had reached a definite decision that it would be an unwarranted risk and useless for him to undertake to salvage and rebuild the boat, and he had abandoned her and had, before leaving Maui on the 8th, asked

the Coast Guard to so advise the agents of the insurance company of such surrender.

At Mr. Matthew's request he went the same day to the office of the insurance agents' attorney, Thomas Waddoups. There he was asked if he was abandoning the sampan and he said, "Yes", he had abandoned it. Then Mr. Waddoups told him to get a lawyer and he was told to come back on Monday, the 13th, and bring his wife. He attended the Monday meeting. A number of persons were then present at Mr. Waddoups' office and he learned that the insurance company had two days prior entered into a charter party with King, Limited, to send the tug "Maizie C" to Maui to undertake salvage operations under control of a Mr. Gallagher, a ship surveyor, as agent for the respondent. The following day libelant's attorney wrote respondent demanding $10,500 for total loss under the policy.

The charter party above mentioned was put in evidence as libelant's Exhibit "B". It provided that an attempt be made to float the sampan and tow her to a Marine Railway at Honolulu, the owners of "Maizie C", an oil screw motorboat, to be paid $15 per hour for hire with three regular crew and $1.00 per hour for three additional crew, also $100 for additional insurance protection, and any and all other expenses incurred by her owner, or agents, which were reasonably necessary to the undertaking; provided, on express agreement, that if salvage operations were not successful at the time charges amounted to the sum of $1,500, including charges for the tug's

return to Honolulu, the salvage operations were to be abandoned and the "Maizie C" was to return forthwith to Honolulu, unless the Charterer or its agent on the spot authorized a continuance of said operations in writing; and if "Miss Philippine" was damaged or lost during the salvage operations the Charterer would be responsible therefor.

Salvage operations under the charter and otherwise were begun at Kaupo, Maui, on Saturday, June 11, under the directions of Mr. Gallagher. The sea had quieted down considerably, although the beach is always exposed to channel currents. Several large-sized air bags were brought ashore from the "Maizie C", together with a small air compressor for inflating them. The bags were secured under deck and inflated. Mr. Gallagher procured the services of a heavy-duty bulldozing machine and its operator and brought it to the beach. The bulldozer pushed and the "Maizie C" pulled; eventually, the boat was turned with prow toward the sea and was pushed and pulled several hundred feet until she had reached sufficient depth for the "Maizie C" to pull her into deep water. A photograph was exhibited to the Court showing the powerful bulldozer a considerable distance from the shore in what appeared to be a perilous position with spray flying over it, but apparently this picture was not put in as an exhibit. Upon reaching deep water the vessel capsized, turning completely upside down. This resulted in a serious towing problem for the "Maizie C", a motorboat. Towing was begun, however, along the lee side of Maui by

nightfall of June 13 she had made, at a rate of about four miles per hour, 40 to 45 miles, to a point near Lahaina. From this point forward the tow would have to leave the lee of Maui and encounter rough seas, first in the Pailolo Channel running between Maui and Molokai, and then, if he tried to make Honolulu with his heavy tow, in the wider Kaiwi Channel between Molokai and Oahu. Hagood thought it would be very difficult and problematical of success to cross both channels. By this time the $1,500 limitation fixed by the Charterer had become exhausted; he radiophoned from his boat to his company telling his position and the situation. His company took the matter up with the respondent and received a statement from it that it had no further instructions beyond the terms of the Charter.

Upon learning this Captain Hagood considered himself in a serious predicament for he knew that if he cut the tow loose he would be liable for creating a derelict on the high seas. He said he was apprehensive that if he attempted to tow the wreck to Honolulu it might break up in the rough channel. He asked further instructions from his owner and was told to try to get the boat into a safe harbor, and tie her up, but to use his discretion. He could have taken her to Moala or other ports nearby on Maui, but he decided to try to make Kaunakakai on Molokai, where a friend of his named Yamamoto had a small boatbuilding business and where the wharf was equipped with two heavy cranes. He arrived there the next day, Tuesday, June 14, and tied the wreck to the wharf.

The same day Mr. Gallagher and C. G. Chipchase, an officer of respondent, flew from Honolulu to Kaunakakai and made arrangements with California Packing Corporation, which operates the wharf, to have the boat slung, lifted and warped to an upright position, and then returned to Honolulu. Before Captain Hagood left Kaunakakai he visited his friend Yamamoto and discussed the situation and, while the full scope of the conversation was not disclosed, the part disclosed strongly indicated that he told Yamamoto he could have the boat if he moved it away from the wharf to his lot. In any event the vessel was taken to Yamamoto's inland yard at some later date. Captain Hagood testified that he would not have accepted the wreck as a gift, but that Yamamoto thought it had some salvage value to him. Upon lifting and turning the vessel over, further damage was done in crushing her sponsons, a protruding part of the hull, by compression of the slings.

On July 16, King, Limited wrote to the attorney for the libelant saying they were in receipt of a letter from the Board of Harbor Commissioners directing them to remove the "Miss Philippine" from alongside the wharf at Kaunakakai and telling the attorney that if his client as well as the insurer claimed no further interest in the vessel it was the intention of King, Limited to "cannibalize and destroy" the vessel. Apparently no reply was received from either party.

Appendix C

Opinions and Conclusions[3]

The respondent questions the right of the libelant to abandon the vessel on the beach at Kaupo, Maui, and his refusal to take her over at Kaunakakai, Molokai, but I believe his judgment in abandoning her on the beach was vindicated by every subsequent event, and that there certainly was no duty on libelant to seek her possession after respondent had abandoned her at sea.

When the insurer, thinking its judgment was best, after notice of libelant's abandonment, took her into its control on June 11 and bulldozed her off the beach and then abandoned her carcass at sea two days later in an upturned position, she was a derelict at the mercy of the sea, save for the acts of King, Limited, which then took her in a new charge with right of ownership as salvor and towed her remains to a harbor of its selection where she was tied fast to a wharf. The fact that the insurer's agents came in afterwards and had her righted, keel down, does not dispose of their abandonment of her at sea the day before, for this to my mind was a clear and constructive acceptance of libelant's abandonment and respondent's claim of right of disposition. On June 14, King, Limited, were dealing with the wreck as their problem and no showing was made that the

[3]Ap. 21.

insurer had the consent of King, Limited, to touch a hand to her at Kaunakakai.

The evidence of Mr. Gallagher that she might have been repaired for $7,500 was in no manner convincing. The "human probabilities rule" as to the cost of getting her off the beach and her condition thereafter, and the cost of getting her into a marine railway at Honolulu and repairing her to good and staunch seaworthy condition, are not of value in the facts of this case, where "human probabilities" could be so highly colored by guesswork alone. The libelant's manager believed, in effect, that he would be putting good money after bad in experimenting further with such an uncertainty and this view was confirmed after he discussed the matter with the boat's builder. I am convinced that he would have made the same decision if he had had no insurance policy. The respondent, which had $10,500 at stake as to the question of a total loss, seems to have come to the same conclusion on June 13, that salvage was hopeless; for it was then responsible for the position of the wreck and, in response to request for instructions, gave it to the sea or to King, Limited.

My conclusion is that the libelant was justified in abandoning the wreck and gave notice of such decision timely and that he was justified in refusing to have the wreck wished on him at a later date after abandonment at sea by the respondent. There is no question that an insurer may by its conduct make itself liable for a total loss and it is my opinion that the

respondent is liable for payment of a constructive total loss.

Judgment will enter accordingly.

Dated at Honolulu, Hawaii, April 19, 1950.

/s/ D. E. METZGER,
United States District Judge.

(Endorsed):
Filed April 19, 1950.